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February 7, 2008

The Honorable Thomas L. Sansonetti  
Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice  
950 Pennsylvania Ave., N.W., Room 2141  
Washington, D.C. 20530

Re: Proposed Settlement in *Save the Manatee, et al., v. Ballard, et al.*  
Civil Action No. 1:00cv00076 (D.D.C.) (Before the Honorable Hammer G. Sullivan)

Dear Mr. Sansonetti:

I am writing on behalf of the City of Jacksonville, Florida to object on procedural and substantive grounds to a proposed settlement filed with the United States District Court for the District of Columbia in the above-referenced case, now before Judge Sullivan. I ask that this letter be brought to the Court's attention by the United States prior to the scheduled hearing on the United States' pending motion to approve the settlement, and with it, changes to the current consent decree.

The City objects on procedural grounds because the United States has not complied with 28 C.F.R. § 50.7, requiring public notice and thirty days to comment on a settlement in this major environmental case. The settlement will significantly affect the issuance of dredge fill permits in Florida, permits governing the discharge of pollutants to these waters.

The affected permits include permits within the City of Jacksonville, home of over 1,000,000 people and a major port. The City has substantial economic, recreational, safety, and other interests which may be significantly affected by the proposed settlement, but has been deprived of its ability to present its concerns about them before the United States committed to the proposed settlement.

This letter also outlines the City's significant substantive objections. Because of the federal government's failure to follow the procedures mandated by 28 C.F.R. § 50.7 for a settlement of this type, the City's ability to present its substantive objections has been greatly impaired.

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The City submits that the United States should seek a delay in the briefing schedule in order to comply with its own rule and to take public comment on the substantial changes to the consent decree the United States is now proposing that the Court make.

### Background

This action involved environmental groups' challenges to the Fish and Wildlife Service's handling of marine protection rules in the southeastern United States. The action was settled by consent decree in early 2001. The City of Jacksonville is not a party to that litigation.

Pursuant to that Decree, the FWS published proposed rules and took certain other action. Plaintiffs challenged those actions, and late last year moved to hold the Secretary of the Interior in contempt for failing to comply with the Decree. The FWS published proposed rules pursuant to the Decree, and the City of Jacksonville has timely commented upon those rules, both orally at a FWS hearing in Palatka, Florida for that purpose in December, and in writing in comments e-mailed on January 9, 2002.

After the motion for contempt was filed, the United States and the plaintiffs negotiated a stipulated settlement of those issues, and memorialized those in a stipulation. The effect of the stipulation is to greatly modify the substantive terms of the Consent Decree, including the handling of applications for dredge-fill permits under section 404 of the Clean Water Act.

The terms of the stipulation were kept confidential until they were filed on Friday afternoon, January 24, 2003. The City was not privy to them, and not party to those negotiations. Prior to the filing, the United States and the plaintiffs agreed to a briefing schedule that makes no provision for public notice or comment on the settlement prior to presentation to the court. The court approved that schedule and set the hearing to approve the settlement for February 27. Several commercial organizations who had previously intervened may object to the settlement, but their interests are materially different than the strong public interest of the municipalities affected by the proposed settlement.

### Procedural Objections

The Department's regulations have provided since 1973 that before presenting a settlement of a case involving discharges of pollutants to the environment, the Department must give the public notice and 30 days in which to comment on the settlement. The proposed settlement contains terms that substantially affect the handling of permits under section 404 of the Clean Water Act, 33 U.S.C. § 1344, in and for the City of Jacksonville among others.

As you are aware, permits under section 404 govern the discharge of dredged and fill material into waters of the United States. Cases involving settlements under section 404 of the Clean Water Act have been routinely subject to this regulation. See, e.g., *United States v. Rueth Development Company*, 189 F.Supp. 2d 874, 876 n.4 (N.D. Ind. 2001); *United States v. Tullerich Co.*, 846 F.Supp. 1400, 1401 (D. Colorado 1994).

The purpose of this regulation is to assure that settlements in these important environmental cases are made in a way which assures full public scrutiny of these important issues, and allows the

United States the opportunity to withdraw from such proposed settlements if facts brought forward in the notice and comment process show that the settlement was not in the public interest.

The proposed settlement has potentially significant adverse effects on manatees in the waters of the City of Jacksonville. The City is one of the largest ports on the East Coast of the United States, and the site of multiple development projects subject to section 404 requirements, projects intended in part to improve public access to the St. John's River for water-based recreation. We are persuaded by the research of Dr. Edmund Gerstein<sup>1</sup> of Florida Atlantic University that establishing a 25 mph speed limit in the marked channel and slow speed zones outside the channel from Raddie Point to the Fuller Warren Bridge may increase the number of strikes to and deaths of manatees. Manatees traversing the slow speed zones on either side of the channel will hear the noise of the boats moving in the channel. That noise will mask the sounds of slower boats outside of the channel. Unable to hear boats outside the channel, they will not be able to avoid them. This could result in even more manatee injuries, contrary to the environmental purpose of the settlement which is to protect and conserve manatees.

A more significant problem suggested by Dr. Gerstein's research is the value of speed zones in turbid waters like those in Duval County. Speed zones make the most sense when the water is clear and boaters can see a manatee. The waters of Duval County are tannic, dark and murky. Even at slow speed, it is difficult to see manatees. The research demonstrates that manatees cannot hear noises from slow speed engines until the boat is almost upon them. They can hear the noisier sounds of a faster boat at greater distances in time to avoid being struck.

The City of Jacksonville has developed a more approved manatee protection plan. The plan was based in part on research conducted by Quinston White, Ph.D. of Jacksonville University. Data from this research is contained in the Duval Manatee Protection Plan which is updated annually. There is a distinct seasonal population pattern which is well documented.<sup>2</sup> The current manatee protection slow speeds zones were adopted were based on the behavior of both boaters and manatees.

The proposed stipulated order greatly expands the width and extent of slow speed zones in the City of Jacksonville. If approved by the court and adopted by the U.S. Fish & Wildlife Service those well-intentioned measures may do more harm to the manatee than good. The proposed order clearly requires public comment to fashion a scientifically defensible program to protect manatees.

There are likely to be other important public interests affected by the settlement which the City has not had an opportunity to identify and explain, because of the United States' failure to follow this rule.

The City asks that the United States seek an adjustment to the briefing schedule in order to publish public notice of the proposed settlement and to seek comment for 30 days about its advisability and consistency with the public interest. This adjustment will allow the United States to

<sup>1</sup> E. Gerstein, Manatee, Riverboat and Boat-Homing rats: environmental manurements and acoustic phenomena may together explain why boats and animals collide, 30 American Scientist 153-161 (March April 2002).

<sup>2</sup> White, A.Q., G.L. Finto, A.P. Robinson. 2002. Seasonal Distribution of manatee, Trichechus manatus latirostris, in Duval County and Adjacent Waters, Northern Florida. Florida Scientist 45(3) 204-221.

evaluate the broad range of public interests potentially affected before going forward with drastic changes in an important environmental consent decree.

### Outline of Substantive Objections

The City of Jacksonville cannot reasonably be expected to present its full substantive objections to this complex settlement without at least 30 days in which to evaluate the terms. In the few days it has had so far to review the terms of the proposed settlement, the City has identified the following issues as potentially significant public interest concerns which the federal government should be weigh before agreeing to a settlement which impinges on these interests:

(a) the proposed settlement obliges the United States to propose imposition of a buffer zone of one thousand feet along the St. John's River from the Fuller Warren Bridge to the Buckman Bridge. In practical terms this means imposing a "no wake" or "slow speed" zone on both sides of the St. John's River. The zones would comprise over 80 miles of riverfront on both side of the St. Johns (47 miles on the east shore and 33 miles on the west shore), involving 21 marinas with 1408 wet and 1043 dry boat slips in marinas directly affected by this limit, which is materially different than the current meandering shoreline buffer zone at least 500' offshore or 200' feet beyond the longest dock, whichever is greater. This area is one of heavy recreational usage based on the 32,807 state recreational boat registrations in 2001. This waterway is used by tens of thousands of people each year for boating activities, including fishing.

As explained below, the City submits that the data show that the current speed zones in Duval County (Jacksonville)<sup>1</sup> have been substantially reduced manatee deaths from boat strikes, as opposed to dredging activities further downstream. Regardless of the appropriateness of such extensive buffer zones in other parts of Florida, there is no indication that imposition of these additional zones will materially improve safety for the manatees in Jacksonville/Duval County. Yet it is undeniable that these new restrictions in the settlement will inconvenience hundreds of thousands of residents a year, and do so on a permanent basis.

These proposed speed zones also raise boating safety issues. A no-wake or slow speed zone is generally thought to be five knots or less. Yet the current of the St. John's River in this stretch is often three knots. The slow speed zone will mean that vessel maneuverability is substantially compromised, and that some vessels may have difficulty in maintaining headway or staying on course. These are safety concerns for hundreds of thousands of boaters a year need to be weighed in the balance, particularly since the data suggest that the proposed buffer zones will do little to improve manatee protection as opposed to other protections the City believes would be better tailored to Duval County.

(b) The settlement requires the federal government to propose imposing a buffer zone with a slow speed zone on the area downstream of the Fuller Warren Bridge outside the channel. The Port of Jacksonville is one of the largest on the East Coast. The impact of this rule in a busy port area, with strong currents, has to be evaluated from the point of view of marine safety and maneuverability, including increased risks of vessel casualties and oil spills. There is no indication that these concerns - including prevention of oil spills - have been evaluated by anyone, much less

<sup>1</sup> The geographic boundaries of the City of Jacksonville and Duval County are identical.

balanced against the competing environmental concerns sought to be advanced by changing the existing limitations. Obviously a significant oil spill would be highly detrimental to the manatee population.

(c) The City believes that the proposed settlement will not be as effective in protecting manatees in Jacksonville/Duval County as an alternate approach involving temporal restrictions on dredging activities. Analysis of the manatee deaths in the Duval County in recent years suggests that recent dredging for highway construction and channel maintenance is a much greater threat to the manatees than small vessel operations governed by existing buffer zones. The City believes that instead of imposing additional buffer zones and speed limits on Duval County/Jacksonville, limits which might be more appropriate in other areas of Florida, the federal government should first evaluate the use of temporary channel maintenance and in-water construction zones.

The City appreciates your consideration of these serious concerns about the procedural approach to this settlement, and asks for the time and opportunity it would have under 28 C.F.R. § 50.7 to present its substantive concerns in more detail to the United States. This approach would allow the United States, in settling the current dispute, to try to balance the additional and competing safety, environmental, and economic concerns, as well as possible military concerns, with those already identified by the plaintiffs and the Department of the Interior.

Respectfully submitted,

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